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Raymond Kenway

President.

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The Corporation Journal is published by The Corporation Trust Company, monthly, except in July, August, and September. Its purpose is to provide, in systematic and convenient form, brief digests of significant current decisions of the courts, and the more important regulations, rulings or opinions of official bodies, which have a bearing on the organization, maintenance, conduct, regulation, or taxation of business corporations. It will be mailed regularly, postpaid and without charge, to lawyers, accountants, corporation officials, and others interested in corporation matters, upon written request to any of the company's offices (see next page).

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Contents for October

Vested Rights in Unpaid Accrued Dividends

The ruling of the Delaware Supreme Court in *Keller et al. v. Wilson & Co., Inc.*, 190 A. 115[1], to the effect that a vested right to accrued preferred stock dividends may not be destroyed by amendment of the charter of a Delaware company, organized prior to 1927, as to dividends accrued up to the time of the adoption of the amendment, was clarified in *Consolidated Film Industries, Inc. v. Johnson*, 197 A. 489[2], when the Supreme Court of Delaware held that the former decision was also applicable to corporations created after the 1927 amendment of section 26 of the Delaware General Corporation Law. Further clarification was had in *Romer et al. v. Porcelain Products, Inc.*, 2 A. 2d 75[3], when the Chancellor indicated that an amendment of the type condemned in *Keller et al. v. Wilson & Co., Inc.* is not void absolutely—that it would be binding if adopted unanimously, and that a stockholder's delay of more than four years in asserting rights under such an amendment must be regarded as inexcusable and result in the dismissal of a bill seeking to establish such rights. In *Bay Newfoundland Co., Ltd. v. Wilson & Co., Inc.*, 4 A. 2d 668[4], however, the Chancellor overruled a demurrer alleging laches or acquiescence on the part of the complainant stockholder in attempting to enforce its rights, where the evidence showed negotiations with Wilson & Co., Inc., over the period of almost three years which elapsed between the filing of the amendment and of the bill of complaint, with a view of settling the stockholder's claims. In *Havender et al. v. Federal United Corporation*, 2 A. 2d 143[5], the former Chancellor of Delaware ruled that the merger of a Delaware corporation with a wholly-owned subsidiary, having as its purpose the elimination of accumulated preferred stock dividends of the parent company was invalid as to objecting preferred stockholders and that the ruling in the *Keller* case might not be thus circumvented. In a later opinion in the *Havender* case by the present Chancellor, reported at 6 A. 2d 618[6], an injunction was decreed against the declaration of dividends generally until payment of accrued dividends on stock held by complainants, which had not been surrendered under the merger plan, had been made.

The Supreme Court of North Carolina has followed the rule in the *Keller* case by holding, in *Patterson et al. v. Durham Hosiery Mills et al.*, 200 S. E. 906[7], that the right to unpaid accumulated dividends was a vested property right of the plaintiff stockholders, "of which they may not be divested without due process of law."

In Ohio, in *Johnson et al. v. Lamprecht et al.*, 15 N. E. 2d 127[8], the Supreme Court of Ohio ruled that a recapitalization plan, involving an *optional* exchange of preferred stock, with accumulated dividends, for new prior preferred stock and common stock, was valid. The Ohio Court of Appeals has held, in *Harbine v. Dayton Malleable Iron Co.*, 22 N. E. 2d 281, that the owner of preferred stock, not surrendered under a recapitalization plan, upon which there were unpaid cumulative dividends, was entitled to an injunction against further payment of dividends on common stock until his cumulative dividends up to the time of reorganization were paid.

In a recent Maryland decision, *McQuillen et al. v. National Cash Register Co.*, 27 F. Supp. 639, the cancellation of accumulated dividends under a recapitalization plan was held by a Federal court in a minority stockholders' suit to be authorized under the Maryland statutes, where it was accomplished by less than unanimous consent.[9]

Ohio and Virginia have statutes which specifically permit amendments providing for the elimination of accrued undeclared dividends, the Ohio provision being less restrictive than those of Virginia.[10]

[1] The Corporation Journal, December, 1936, page 270. [2] The Corporation Journal, April, 1938, page 150. [3] The Corporation Journal, October, 1938, page 222. [4] The Corporation Journal, May, 1939, page 390. [5] The Corporation Journal, October, 1938, page 222. [6] The Corporation Journal, October, 1939, page 6. [7] The Corporation Journal, May, 1939, page 392. [8] The Corporation Journal, October, 1938, page 224. [9] The Corporation Journal, October, 1939, page 7. [10] Ohio: G. C., Sec. 8623-14, as amended by L. 1939, S. B. 47, effective July 24, 1939; Virginia: Code, 1936, Sec. 3780, as amended by L. 1938, Ch. 309.

Domestic Corporations

Delaware.

Injunction granted against payment of dividends by parent company, into which wholly owned subsidiary had been merged, until accumulated dividends on preferred stock of stockholders objecting to merger shall have been paid. In *Havender et al. v. Federal United Corporation*, 2 A. 2d 143, (The Corporation Journal, October, 1938, page 222), the former Chancellor of Delaware ruled that the merger of a corporation with a wholly owned subsidiary, having as its purpose the elimination of accumulated preferred stock dividends of the parent company, was invalid as to objecting preferred stockholders. At that time no decree was entered because the Chancellor indicated that he wished further argument on the nature of the relief to be granted. In a superseding opinion, the present Chancellor held that the old stock retained by the objecting stockholders continued to be "a valid, outstanding stock of the defendant corporation, with all the preferential rights with respect to the payment of dividends out of the surplus earnings that were given to that stock by the defendant's Certificate of Incorporation." By reason of the fact that at the time of the merger the complainants had vested rights in the corporate surplus which was capitalized in that proceeding, complainants were held not only to be entitled to an injunction against the declaration and payment of dividends upon the corporation's common stock until the accumulated and unpaid dividends on the complainants' stock had been paid, but were also held entitled to an injunction against the payment of any dividends upon the corporation's new preferred stock, (issued under the merger plan in partial exchange for stock of the type held by complainants), until the accumulated dividends on complainants' stock had been paid, as well as against the payment of any future dividends on the new preferred stock until the dividends which may have then accrued on the complainants' stock shall have been paid. *Havender et al. v. Federal United Corporation*, 6 A. 2d 618; Commerce Clearing House Court Decisions Requisition No. 202041A. Hughes & Terry of Dover, and Abraham L. Pomerantz of New York City (Abraham Marcus of New York City, of counsel; James Havender and Leonard I. Schreiber of New York City, on the brief), for complainants. Caleb S. Layton of Richards, Layton & Finger of Wilmington and T. R. White of Philadelphia, Pa. for defendant.

Delaware Supreme Court rules that a stockholder petitioning to examine the stock ledger need allege no more than that he is a stockholder, the making of a proper demand and a failure or refusal of the company to comply with the duty imposed by law. The Delaware Supreme Court, in upholding a stockholder in his statutory right to examine the original or duplicate stock ledger of his company, said: "Where an inspection of the stock ledger is sought by a stockholder, the burden is upon the corporation to show that the stockholder is attempting to exercise the statutory right for a purpose not con-

nected with his interest as a stockholder, or that his purpose is otherwise improper or unlawful. The petitioning stockholder need allege no more than the bare essentials: that he is a stockholder in the respondent company; a proper demand; and a failure or refusal to comply with the duty imposed by law. In the instant case, the petitioner was not content to confine his petition to bare essentials. He set forth at length the history of unlawful and fraudulent acts and conspiracies of former Boards of Directors of the company, and there was nothing in the petition to suggest that the petitioner was moved by idle curiosity, or by any reason or purpose disassociated from his interest as a stockholder. The defendant corporation's answer offered no defense whatever; and the Court below would have been entirely justified if it had awarded the writ notwithstanding the answer, and without hearing." *Insuranshares Corporation of Delaware v. Kirchner,* Delaware Supreme Court, March 31, 1939. Commerce Clearing House Court Decisions Requisition No. 214357. Ivan Culbertson of Wilmington, for plaintiff in error. Max Terry of Dover and Samuel Saline of New York City, for defendant in error.

Iowa.

Reasonable restriction in charter giving corporation ten-day option relative to each proposed sale of its shares, held not to apply to sale of stock by receiver of national bank which owned corporate shares, as sale was not voluntary but was in the interest of the receivership. The articles of incorporation of defendant company contained a provision that no transfer of its special stock was to be valid until ten days after receipt of notice of any proposed sale was received by the company, during which ten days the corporation was to have the sole option to buy the shares at the price named. This restraint on the sale of the shares was printed on the certificates. Plaintiff purchased his shares of the special stock, which he seeks by mandamus to compel defendant to transfer to him on its books, from the receiver of a national bank. The Supreme Court of Iowa, while finding the restriction valid, nevertheless, ruled it was not applicable in this instance, as there was no restrictive provision making it applicable to transfers by operation of law. "The stock," observed the court, "passed to the receiver by operation of law and the sale to the plaintiff was not voluntary but a sale of the interest of the receivership in the stock, made in the performance of the duty of the receiver to wind up the corporate affairs. We hold that the restriction does not apply to the sale of the stock to the plaintiff, and he was entitled to the relief demanded." *McDonald v. Farley & Loetscher Mfg. Co. et al.,* 283 N. W. 261; Commerce Clearing House Court Decisions Requisition No. 208755. Kenline, Roedell & Hoffmann of Dubuque, for appellant. Smith & O'Connor of Dubuque, for appellees.

Maryland.

Cancellation of accumulated dividends under recapitalization plan held authorized by Maryland statutes by Federal court, where

accomplished by less than unanimous consent. In *McQuillen et al. v. National Cash Register Co.*, 27 F. Supp. 639, a recapitalization plan included the cancellation of accrued dividends on Common "A" stock of a corporation. It was alleged by the plaintiffs that this could be validly accomplished only by unanimous consent of the stockholders affected. In considering this question, the United States District Court, District of Maryland, observed: "This precise question, as affected by the Maryland statute, has apparently never been decided or considered in a reported decision of the Maryland Court of Appeals, and also, as far as we are aware, this is the first time it has been before a Federal Court, although the same question, as affected by the statutes of some other States, has been the subject of considerable litigation in those other jurisdictions, notably New York, New Jersey and Delaware, and has been decided favorably to the dissenting stockholders. However, since the statutes of those other States are less broad than the Maryland statute, the decisions in those States are not controlling here." "The Maryland statute," continued the court, "expressly authorizes the insertion, by amendment, of any provision that might, at the time of the amendment, have been inserted in an original certificate of incorporation. Clearly, the disputed provision is of such type. Further, the Maryland statute expressly authorizes any amendment 'which changes the terms of any of the outstanding stock by classification, reclassification or *otherwise*' (italics inserted); defines the word 'terms' as meaning contract rights of stockholders under the charter; and the unanimous consent requirement of the statute is expressly made inoperative when the charter contains an appropriate reservation, which the charter before us does contain. Thus, whether we treat as vested or not," concluded the court, "the right to accrued dividends, it is unquestionably a preferential 'contract right', and, therefore, is embraced within the express provision of the Maryland statute defining the rights that may be abrogated, and in what manner." *McQuillen et al. v. National Cash Register Co. et al.*, 27 F. Supp. 639. Arthur Berenson, of Boston, Mass., and Samuel J. Fisher, of Baltimore, Md., for plaintiffs. Piper, Watkins & Avirett (by James Piper and R. Dorsey Watkins), of Baltimore, Md., for National Cash Register Co. Marbury, Gosnell & Williams (by William L. Marbury, Jr., and William L. Rawls), of Baltimore, Md., for Edward A. Deeds, Ezra M. Kuhns, Stanley C. Allyn, J. H. Barringer, and William Hartman. Bartlett, Poe & Claggett (by J. Kemp Bartlett, Jr.), of Baltimore, Md., for Lee Warren James.

New York.

Court of Appeals affirms, without opinion, ruling in *Albrecht, Maguire & Co., Inc. v. General Plastics, Inc. et al.* On June 2, 1939, the Court of Appeals of New York, affirmed, without opinion, the ruling of the New York Supreme Court, Appellate Division, Fourth Department, in *Albrecht, Maguire & Co., Inc. v. General Plastics, Inc. et al.*, 9 N. Y. S. 2d 415, (The Corporation Journal, March, 1939, page 343),

to the effect that a reclassification of shares, depriving stockholders of preemptive rights as to future issues of stock, is void as to a stockholder voting in opposition of an amendment effecting such a reclassification.

Business corporation, dissolved for failure to pay state taxes, held to be without right to maintain court action. The ruling of the City Court of New York, New York County, in *Seventy-Three First Ave. Corporation, Inc. v. Braunstein Bros. Carbonic Sales Corporation,* 6 N. Y. S. 2d 664, (The Corporation Journal, January, 1939, page 296), affirmed without opinion by the New York Supreme Court, Appellate Term, First Department, 10 N. Y. S. 2d 868, to the effect that a *real estate* corporation, dissolved for failure to pay state taxes, is without the right to maintain a court action, has been followed by the New York Supreme Court, Appellate Division, First Department, which has applied the same rule to a *business* corporation. *Application of S. M. & J. Eisenstadt, Inc.; in re Heffernan,** 10 N. Y. S. 2d 868. William E. Seward of New York City (Horace Heffernan of Gloversville, on the brief) for appellant. David I. Michaelson of New York City, for respondent.

* The full text of this opinion is printed in **The Corporation Tax Service,** New York, page 263.

Ohio.

Where, under a contingency, preferred stockholders were to be "entitled to the same voting power as the holders of the common stock," the preferred stockholders acquired the power to cast one vote for each share of their stock. Under the provisions of articles of incorporation, preferred stockholders, after default in the payment of a dividend upon the preferred stock for one year, were to be "entitled to the same voting power as the holders of the common stock." The Ohio Supreme Court, in ruling upon the limits of the voting power acquired by the preferred stockholders after such a default in dividend, held that the preferred stockholders acquired "the right or power to cast one vote for each share of their stock." The court overruled a contention that, because the common stock shares were substantially 89.04 times the number of the preferred shares, the holders of the preferred stock should have become entitled, *as a group,* to cast a total number of votes exactly equal to the number of outstanding common shares. *The State, ex rel. Cullitan, Pros. Atty. v. Campbell et al.,* Ohio Supreme Court, March 29, 1939. Commerce Clearing House Court Decisions Requisition No. 213662; 20 N. E. 2d 366. Frank T. Cullitan, Pros. Atty., and Halle, Harris, Haber & Berick, of Cleveland, for appellant. S. J. Kornhauser and Paul E. Lees, of Cleveland, for appellees.

Foreign Corporations

Louisiana.

Solicitation of orders in Louisiana followed by acceptance out of state and shipment direct to customer from without state, ruled to be interstate commerce. A foreign corporation, with traveling salesmen soliciting orders in Louisiana, which were sent by mail to the company's home office in Connecticut for acceptance or rejection and, if accepted, followed by shipment of the goods ordered direct to the customer, was held, by the Louisiana Supreme Court, to be engaged in interstate commerce and not required to be licensed to do business as a foreign corporation. *Graham Manufacturing Company v. Rolland,** Louisiana Supreme Court, January 10, 1939. Commerce Clearing House Court Decisions Requisition No. 212513. M. B. Gatlin of New Orleans, for the relator. Sol Weiss, for the respondent.

* The full text of this opinion is printed in **The Corporation Tax Service**, Louisiana, page 518.

Mississippi.

Acceptance in Tennessee of assignment of conditional sales contract on property in Mississippi, held not to be "doing business" in Mississippi. Appellant foreign corporation, not licensed in Mississippi, and having no office or place of business in that state, was engaged in buying trade acceptances, conditional contracts and other financial paper from dealers and others taking such contracts, such purchases being accepted in states other than Mississippi. This suit was instituted by appellant on a conditional sales contract received by mail at Memphis, Tennessee, by appellant and accepted there. The contract was sent by a Mississippi company which had sold a refrigerator to an individual whose contract defendant had assumed. The Supreme Court of Mississippi, Division B, after quoting section 4140, Code of 1930, requiring foreign corporations doing business in Mississippi to be authorized to do so, said: "The contract of purchase by the C. I. T. Corporation was executed and completed at Memphis, Tennessee, and a person or corporation buying such contract or commercial paper outside of the state is not considered as doing business within the state, in the meaning of the statute above set out." *C. I. T. Corporation v. Stuart,** 187 So. 204. V. D. Rowe & H. T. Holmes of Winona, and J. L. Weitlauf of Chicago, Ill., for appellant. Mack L. Boykin of Vaiden, for appellee.

* The full text of this opinion is printed in **The Corporation Tax Service**, Mississippi volume, page 513.

New York.

Delaware corporation, qualified in New York, sued by residents of another state in federal court in New York, held entitled to claim privilege not to be sued in the Southern District, as it is not a resi-

dent of New York when doing business there. An action was instituted in the District Court of the United States for the Southern District of New York by citizens and residents of New Jersey against a New York corporation, of which they were stockholders, to restrain the carrying out of a contract for the sale of property of the New York corporation to a Delaware company, later joined as a defendant. This company had its chief business and executive offices within the Southern District of New York and had designated an agent to accept process when complying with the conditions under which a foreign corporation is legally permitted to do business in New York. Upon being served, the Delaware corporation appeared specially and moved to quash the service and the marshal's return. An appeal was taken from an order granting the motion and dismissing the action as to the Delaware company. The United States Circuit Court of Appeals, Second Circuit, in affirming the order of dismissal, referred to the pertinent portion of Jud. Code, Sec. 51, 28 U. S. C. A. Sec. 112, reading "where jurisdiction is founded only on the fact that the action is between citizens of different states, suit shall be brought only in the district of the residence of either the plaintiff or the defendant." It observed that "the defense of lack of venue was open to this defendant, notwithstanding the presence in the action of other defendants properly sued in the district." As to citizenship, the court pointed out that "on all questions of jurisdiction involving diversity of citizenship, this appellee is conclusively determined to be a citizen of the State of Delaware by reason of its incorporation there," and that "it has been held uniformly by the Supreme Court and generally by the lower federal courts that residence is limited to the state of incorporation of the corporation and is not satisfied by the doing of business within the state." The court also considered the bearing of the Delaware corporation's appointment of an agent for the service of process, located in the Southern District of New York, when the corporation qualified to do business in that state. This, it concluded, did not constitute a waiver of the venue defense so as to amount to consent to be sued in New York in a federal court, and the Delaware corporation was held to be entitled to claim its privilege not to be sued in the Southern District of New York. *Neirbo Company et al. v. Bethlehem Shipbuilding Corp., Ltd.*,* United States Circuit Court of Appeals, Second Circuit, April 10, 1939. Commerce Clearing House Court Decisions Requisition No. 213972. Robert P. Weil (Laurence A. Tanzer, of counsel) of New York City, for appellants. William Dwight Whitney (Cravath, deGersdorff, Swaine & Wood and Robert D. Blasier, of counsel) of New York City, for appellee. *(Appeal to the Supreme Court of the United States filed. April 27, 1939; Docket No. 38.)*

* The full text of this opinion is printed in **The Corporation Tax Service**, New York, page 258.

Breach of contract, personal in nature, accepted in another state, held to give rise to a chose in action, which might be assigned by an unlicensed foreign corporation, upon which its assignor could re-

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cover in New York. Defendant had entered into a contract with plaintiff's assignor, an unlicensed foreign corporation, which was subject to acceptance in Illinois, for a complete correspondence course in electric refrigeration and air conditioning, at a tuition fee of $125, of which only $15 had been paid. Defendant urged that the contract, being personal, could not be assigned. On this point, the Supreme Court, Special Term, New York County, said: "The contract at bar is a contract of a personal nature involving the relation of personal confidence, individual instruction under supervision of a teaching staff and practical experience in the Institute's training laboratories. The rule, however, applies to an unexecuted contract. Here the defendant breached the contract. The monthly instalments all fell due before the action was started. The plaintiff's assignor, however, did not assign an unexecuted contract, but a right to recover damages based on a contract which the defendant breached. A chose in action may be assigned, which is all that was done in this case. The damages are measured by the tuition fee less payments made." *Sackman v. Stephenson*, 11 N. Y. S. 2d 69. Reuben S. Levins of New York City, for plaintiff. Fred J. O'Donnell of Ilion, for defendant.

North Carolina.

Service of process upon corporation set aside where made upon its president while within state on personal business. Although defendant corporation was not engaged in business in North Carolina and maintained no agent and owned no property there, service of process was made upon its president as its agent while he was within the state on personal business not connected with the business of the company. The Supreme Court of North Carolina, following the ruling of the Supreme Court of the United States in *Riverside & Dan River Cotton Mills v. Menefee*, 237 U. S. 189, a prior North Carolina case carried to the highest court, held that jurisdiction had not been acquired over the company and that the action of the lower courts in dismissing the suit as to the corporation was proper. *Langley v. Planters Tobacco Warehouse, Inc., et al.*,* 1 S. E. 2d 558. W. K. McLean of Asheville, for appellant. Milligan & Haynes of Greeneville, Tenn., and Lee & Lee of Asheville, for appellee.

* The full text of this opinion is printed in **The Corporation Tax Service**, North Carolina volume, page 146.

Wisconsin.

Service upon former vice-president of unlicensed foreign corporation regarded as ineffective where made upon him subsequent to acceptance of his resignation; listing of his name as vice-president in latest annual report filed in home state held not conclusive. Service of process upon an unlicensed foreign corporation was attempted by delivering an amended summons and complaint to a person who had been a vice-president of the company. The corporation appeared

specially for the purpose of objecting to the jurisdiction of the court and subsequently instituted this action in the Supreme Court of Wisconsin seeking a writ of prohibition commanding the circuit court to refrain from proceeding further against the corporation in the action in which the validity of service was at issue. The Supreme Court of Wisconsin granted the writ upon evidence showing a resignation of the vice-president six months prior to the service, supported by certified copies of minutes of the meeting at which the resignation was accepted and by affidavits of officers of the company. Referring to the annual report of the corporation filed in its home state, Delaware, six months before the service of process, and to the listing of the name of the vice-president as such in that report, filed a few days before the resignation was accepted, the court said: "The fact that the annual Delaware corporation report, certified December 31, 1937, and filed January 4, 1938, listed Meyer L. Schwartz as vice-president constituted sufficient basis for the application of the presumption of law that a condition or status once proven to exist is presumed to continue in the absence of evidence to the contrary. S. S. Kresge Co. v. Garrick R. Co., 209 Wis. 305, 310, 245 N. W. 118, 85 A. L. R. 283; Racine County v. Industrial Comm., 210 Wis. 315, 317, 246 N. W. 303; Krantz v. Krantz, 211 Wis. 249, 257, 248 N. W. 155. But that presumption is applicable only in the absence of evidence to the contrary. Such a presumption of law is not in and of itself in the nature or character of actual evidence. It is applicable and can constitute the basis for a finding only when there is no evidence at all as to the subsequent existence of the condition or status in question, and it disappears and is of no weight or significance whatsoever when, as in the case at bar, there is some uncontradicted and unimpeached, and not inherently incredible, evidence to the contrary." *State ex rel. Northwestern Development Corporation v. Gehrz, Judge, et al.*, 283 N. W. 827. Bloodgood, Kemper & Passmore (Charles H. Galin, of counsel) of Milwaukee, for petitioner. Dougherty, Arnold & Kivett of Milwaukee, for respondents.

Taxation

Arkansas.

Imposition of income tax upon income of Arkansas corporation derived from sources outside of Arkansas, held improper; provisions of income tax law prohibiting recourse by injunctive relief held invalid as to such a company. The Supreme Court of Arkansas has affirmed a decree of the Chancellor to the effect that "the imposition of an income tax upon a domestic corporation, doing business both within and without this state, on income derived from sources outside of Arkansas denies to such domestic corporation the equal protection of the laws and amounts to the taking of its property without due process in violation of the Fourteenth Amendment to the Constitution of the United States and Article II, Section 8, of the Constitution of the State of Arkansas." The appellee company had instituted this

action, seeking an injunction to restrain the collection of the income tax as to it, in the Pulaski Chancery Court, despite a provision in the income tax law prohibiting recourse by taxpayers to injunctive relief. The Supreme Court ruled that provision invalid as applied to the appellee, and held that the Chancery court had jurisdiction to hear the cause and to grant the injunction sought. *McCarrol, Commissioner of Revenues, v. Gregory-Robinson-Speas, Inc.,** 129 S. W. 2d 254; Commerce Clearing House Court Decisions Requisition No. 214517. Lester M. Ponder, and Frank Pace, Jr., of Little Rock, for appellant. Paul Martin, Jr., and Owens, Ehrman & McHaney, of Little Rock, for appellee.

* The full text of this opinion is printed in **The Corporation Tax Service**, Arkansas volume, page 1522.

Mississippi.

Foreign pipe line company, licensed to do business in Mississippi, held subject to franchise tax, even though engaged solely in interstate commerce. A Delaware company, which was authorized to do business in Mississippi, transported gas by its pipe lines from Louisiana into Mississippi and for about seventy-five miles through Mississippi into another part of Louisiana, where the gas was sold. On the way gas was also sold at wholesale to three distributors in Mississippi. Contracts in connection with such wholesale sales were entered into in New York and collections made from Louisiana. The company had no office or bank account in Mississippi, but it paid property taxes there on its rights of way, pipe line and telephone line and other real and personal property used in carrying on its pipe line activity. It sought, in this action, to recover franchise taxes, paid under protest, on the ground that it was engaged only in interstate commerce in Mississippi. The United States Circuit Court of Appeals, Fifth Circuit, held that the tax was valid and could not be recovered. The franchise tax was imposed upon every foreign corporation "doing business" within the state. The statute defined "doing business" to mean and include each and every act, power or privilege exercised and enjoyed in this State as an incident to or by virtue of the powers and privileges acquired by the nature of such organization. The court regarded the corporation as "doing business" within this definition, since, upon qualification, "it began the enjoyment in Mississippi of a privilege incident to its corporate organization." Because the corporation had been granted the power in Mississippi to do much more than to engage in the interstate transportation of gas and oil, the court reasoned thus: "This franchise or privilege tax is not escaped because the Gas Company chose only to transport and sell gas interstate. It owes no more tax because it did that. Therefore that activity is not taxed." Concluding, the court remarked: "The State of Mississippi has not taxed this Gas Company on its transportation of gas into or through Mississippi. Whether it transports or not, or transports much or little, does not

affect the tax. The tax therefore does not directly affect the transporation. Like a poll tax on men, it is demanded of all business corporations having capital in Mississippi just for being there with their capital. We hold the tax valid and not to be recovered." *Stone, Commissioner of Franchise Tax v. Interstate Natural Gas Company,** Commerce Clearing House Court Decisions Requisition No. 215174; 103 F. 2d 544. J. A. Lauderdale and Greek L. Rice of Jackson, Miss., for appellant Stone. Garner W. Green, Marcellus Green and Forrest B. Jackson of Jackson, Miss., William A. Dougherty of New York City and Maxwell Bramlette of Woodville, Miss., contra. *(Appeal filed in The Supreme Court of the United States, May 29, 1939; Docket No. 77. Certiorari granted, June 5, 1939.)*

* The full text of this opinion is printed in **The Corporation Tax Service**, Mississippi volume, page 1548.

New Jersey.

The Supreme Court of the United States affirms judgment upholding tax on capital stock paid in and accumulated surplus of a New Jersey fire insurance company. In *Newark Fire Insurance Company v. State Board of Tax Appeals et al.*, 193 Atl. 912, (The Corporation Journal, January, 1939, page 302), the New Jersey Supreme Court, in an opinion later affirmed by the New Jersey Court of Errors and Appeals at 198 Atl. 837, ruled that a New Jersey fire insurance company which had been assessed under a section requiring the assessment of such a company "in the taxing district where its office is situate, upon the full amount of its capital stock paid in and accumulated surplus," was taxable in New Jersey on intangibles having a business situs in New York. The Supreme Court of the United States has affirmed the judgment of the New Jersey courts. Describing the tax, the court said: "The present tax, as administered, is levied upon an assessment of the full amount of capital stock and surplus. It is a tax on the net value of the corporation less allowable deductions, reached by taking liabilities from gross value of assets and subtracting exempt items from the remainder. This is apparently because capital stock and surplus are treated as invested in the exempt assets. The value thus assessed is not determined by specific items but is the result of a calculation in which all assets are involved except those definitely exempted. Our conclusion makes it unnecessary to resolve doubts as to whether this is a property tax." Continuing, the court remarked: "Appellant contends that if New York may levy a property tax on these intangibles, it will violate the due process clause of the 14th Amendment to permit New Jersey to do the same thing; that property cannot be in two places; that if it is in New York for tax purposes, it cannot be in New Jersey. We are asked to decide that both states have not the power to tax the same property for the same incidents. This question has been heretofore reserved. We do not find it necessary to answer it in this case." The court pointed out that the record was silent as to the character, source and use of the securities and credits of the company. "If we

were to assume," concluded the court, "that the intangibles of a corporation may have only one taxable situs, the mere fact that general affairs of a foreign corporation are conducted by general officers in New York without further evidence of the source and character of the intangibles does not destroy the taxability of a part of these intangibles by the state of the corporation's legal domicile. The presumption of a taxable situs solely in New Jersey is not overturned." *Newark Fire Insurance Company v. State Board of Tax Appeals et al.; Universal Insurance Company et al. v. State Board of Tax Appeals et al.,** 59 S. Ct. 918. Commerce Clearing House Court Decisions Requisition No. 217185. Arthur T. Vanderbilt of Newark, N. J., for appellant Newark Fire Ins. Co. John G. Jackson of New York City and Jehiel G. Shipman of Newark, N. J., for appellants Universal Ins. Co. and another. Donald R. Richberg of Washington, D. C., for appellees.

* The full text of this opinion is printed in **The Corporation Tax Service**, New Jersey volume, page 2284.

Pennsylvania.

Unconstitutionality of Store and Theatre Tax Act affirmed by Pennsylvania Supreme Court. The Supreme Court of Pennsylvania has affirmed the decree of the Dauphin County Court in two cases in which the latter court ruled that the Pennsylvania Store and Theatre Tax Act was invalid. (The Corporation Journal, April, 1939, page 376.) The higher court concluded that, as the act provided for a progressively graduated tax, the tax was lacking in uniformity and violated article IX, section 1, of the State Constitution. *American Stores Co. v. Boardman, Secretary of Revenue; Stanley Co. of America et al. v. Boardman et al.,** 6 A. 2d 826. John Y. Scott of Harrisburg and Claude T. Reno, Attorney General, for appellant. Douglas D. Storey of Harrisburg and Morris Wolf of Philadelphia, for appellees Stanley Co. and others. Theodore Voorhees, Joseph Gilfillan of Philadelphia and George R. Hull of Harrisburg (Snyder, Hull, Leiby & Metzger of Harrisburg, and Gilfillan, Gilpin & Brehman and Barnes, Myers & Price of Philadelphia, of counsel), for appellee American Stores Co.

* The full text of this opinion is printed in **The Corporation Tax Service**, Pennsylvania, page 4368.

Appealed to The Supreme Court

The following cases previously digested in The Corporation Journal have been appealed to The Supreme Court of the United States.*

CALIFORNIA. Docket No. 225. *De Aryan v. Akers*, 87 P. 2d 278. (The Corporation Journal, May, 1939, page 400.) Collection of retail sales tax from consumer. **Appeal filed July 26, 1939.**

MISSISSIPPI. Docket No. 77. *Interstate Natural Gas Co. v. Stone*, 103 F. 2d 544. (The Corporation Journal, October, 1939, page 16.) Franchise tax on foreign pipe line company engaged in interstate commerce. **Appeal filed, May 29, 1939. Certiorari granted, June 5, 1939.**

NEW JERSEY. Docket No. 449. *Newark Fire Insurance Company v. State Board of Tax Appeals and the City of Newark*, 193 Atl. 912. (The Corporation Journal, January, 1939, page 302.) State Taxation—tax on intangible personal property of a domestic insurance company. **Appeal filed, October 31, 1938. Further consideration of the question of jurisdiction postponed to the hearing on the merits, November 21, 1938. Motion of Sun Oil Company for leave to file brief as amicus curiae submitted and the motion denied, March 27, 1939. Argument commenced, April 18, 1939. Argument concluded, April 19, 1939. Affirmed, May 29, 1939.** (See page 17.)

NEW YORK. Docket No. 38. *Neirbo Company et al. v. Bethlehem Shipbuilding Corporation, Ltd.* (The Corporation Journal, October, 1939, page 10.) Jurisdiction over foreign corporation qualified to do business in the state. **Appeal filed, April 27, 1939. Certiorari granted, May 29, 1939.**

NEW YORK. Docket No. 45. *McGoldrick, Comptroller of the City of New York v. Felt & Tarrant Mfg. Co.*, 4 N. Y. S. 2d 615; (The Corporation Journal, December, 1938, page 282), affirmed without opinion, New York Court of Appeals, 279 N. Y. 678, 18 N. E. 2d 311. Constitutionality of New York City sales tax as applied to shipments which may be in interstate commerce. **Appeal filed, May 8, 1939. Certiorari granted, June 5, 1939.**

TEXAS. Docket No. 17. *Ford Motor Company v. Edward Clark, Secretary of the State of Texas et al.*, 100 F. 2d 515. (The Corporation Journal, April, 1939, page 376.) State annual franchise tax on corporations—basis of tax. **Petition for certiorari filed, March 15, 1939. Petition granted, April 3, 1939. Motion to substitute Tom L. Beauchamp, present Secretary of State, and Gerald Mann, present Attorney General, as parties respondent in place of Edward Clark and William McCraw, respectively, granted, May 1, 1939.**

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* Data compiled from CCH **U. S. Supreme Court Service, 1939-1940.**

Regulations and Rulings

CALIFORNIA—By a revision of Sales Tax Ruling No. 74, the State Board of Equalization has indicated that "the tax does not apply to receipts from sales to the United States or to any agency or instrumentality thereof except a corporate agency or a corporate instrumentality." (California CT (Corporation Tax) Service, ¶ 64-082.)

GEORGIA—The Attorney General of Georgia has ruled that a domestic corporation which engages in no business in the state other than holding stock in another company is liable for the corporate license (franchise) tax. (Georgia CT Service, ¶ 4-001.)

IOWA—The State Tax Commission, Income Tax Division, has indicated that payments required by law to be made by an employer to the Federal or State fund for unemployment relief, or to the Federal fund for Social Security are deductible from the gross income of the employer who pays them, for the year in which the payments are made, as "ordinary and necessary business expense." (Iowa CT, ¶ 1544.)

MASSACHUSETTS—The Commissioner of Corporations and Taxation has stated that where a corporation has paid certain foreign income and profits taxes and the corporation has claimed these taxes as a credit on its Federal return and the Federal Government has allowed the credit, such taxes may be deducted from net income for the purpose of computing the Massachusetts corporation excise tax. (Massachusetts CT, ¶ 14-508.)

MISSISSIPPI—The Income Tax Division has stated that contributions or payments made by an employer in connection with Social Security are considered a necessary business expense or tax, and for that reason are deductible from gross income in determining net taxable income. (Mississippi CT, ¶ 1549.)

TENNESSEE—The Attorney General has indicated that goods and materials sent to a clothing company in Tennessee for the performance of a service thereupon do not constitute property "owned or used" within the meaning of the franchise tax law providing that a corporation's minimum tax base shall be the actual value of the property owned or used by it in the state. (Tennessee CT, ¶ 4-005.) The Attorney General has also ruled as follows with respect to a corporation consigning merchandise to dealers in Tennessee who sell to purchasers in that state: If the dealers are actually sales agents of the corporation, then the corporation is doing business in Tennessee and is subject to the franchise tax; however, if the relationship is that of two independent contractors, then no franchise tax is due. (Tennessee CT, ¶ 4-004.)

TEXAS—The Attorney General of Texas has rendered an opinion to the Secretary of State to the effect that, in computing corporate franchise taxes, notes maturing less than one year from the dates of issue, including demand notes, may not be considered, although such notes are past due and unpaid or are renewed several times for a period of less than one year. (Texas CT, ¶ 1435.)

WYOMING—Corporations organized for profit but having no capital, property or assets in Wyoming, are subject to the minimum annual license fee of $5. (Opinion, Attorney General, Wyoming CT, ¶ 1505.)

Some Important Matters for October and November

This Calendar does not purport to be a *complete* calendar of all matters requiring attention by corporations in any given state. It is a condensed calendar of the more important requirements covered by the *State Report and Tax Bulletins* of The Corporation Trust Company. Attorneys interested in being furnished with timely and complete information regarding *all* state requirements in any one or more states, including information regarding forms, practices and rulings, may obtain details from any office of The Corporation Trust Company or C T Corporation System.

CALIFORNIA—Quarterly Retail Sales Tax Return and Payment due on or before October 15.—Domestic and Foreign Corporations.

GEORGIA—Certified Statement for Registration due on or before November 1.—Domestic and Foreign Corporations.

INDIANA—Quarterly Gross Income Tax Return and Payment due on or before October 15.—Domestic and Foreign Corporations.

IOWA—Quarterly Retail Sales Tax Return and Payment due on or before October 20.—Domestic and Foreign Corporations.

LOUISIANA—Franchise Tax Report and Tax due on or before October 1.—Domestic and Foreign Corporations.

MASSACHUSETTS—Second instalment of Excise Tax due on or before October 20.—Domestic and Foreign Corporations.

NEW YORK—Second instalment of Income Tax of Business Corporations due on or before November 15.—Domestic and Foreign Business Corporations other than real estate and holding companies.

Supplementary Franchise Tax Return (Form 60 CT) due on or before November 30.—Domestic and Foreign Corporations organized or qualified between May 15 and November 1 of current year.

NORTH DAKOTA—Quarterly Retail Sales Tax Return and Payment due on or before October 20.—Domestic and Foreign Corporations.

RHODE ISLAND—Semi-Annual Report to Department of Labor during October and April.—Domestic and Foreign Corporations employing five or more persons in Rhode Island.

WEST VIRGINIA—Quarterly Gross Income Tax Return and Payment due on or before October 30.—Domestic and Foreign Corporations.

The Corporation Trust Company's Supplementary Literature

In connection with its various activities The Corporation Trust Company publishes the following supplemental pamphlets and forms, any of which will be sent without charge to readers of The Journal. Address The Corporation Trust Company, 120 Broadway, New York, N. Y.

What Constitutes Doing Business. (Revised to March 15, 1939.) A 184-page book containing brief digests of decisions selected from those in the various states, as indicating what is construed in each state as "doing business." The digests are arranged by state, but a Table of Cases and a Topical Index make them accessible also by either case name or topic. There is also a section containing citations to cases on the question of doing business such as to make the company subject to service of process in the state.

When a Corporation Leaves Home. A simple explanation of the reasons for and purposes of the foreign corporation laws of the various states, and illustrations of when and how a corporation makes itself amenable to them. Of interest both to attorneys and to corporation officials.

We've Always Got Along This Way. This is a 24-page pamphlet giving brief digests of cases in various states in which corporation officials who had thought they were getting along very well with statutory representation by a business employe suddenly found themselves penalized in unusual and often embarrassing ways: such as one company that had to pay its employe-representative's alimony.

What! *We* Need a Transfer Agent? Nonsense! The foregoing is the title of a pamphlet which describes in detail, with many illustrations, the exact steps through which a stock certificate goes in being transferred from one owner to another by an experienced transfer agent—purpose being to enable any corporation official to judge more accurately whether or not his own company should use the services of a transfer agent.

Judgment by Default. Gives the gist of Michigan Supreme Court case of Rarden v. Baker and similar cases in other states, showing how corporations qualified as foreign in any states and utilizing their business employes as statutory representatives are sometimes left defenseless in personal damage and other suits.

A Corporation's Achilles Heel. Containing the complete text of the opinion of the Supreme Court of the United States in State of Washington ex rel. Bond & Goodwin & Tucker, Inc. v. Superior Court, State of Washington, of the Supreme Court of New Mexico in Silva v. Crombie & Co., and of the Supreme Court of Michigan in Rarden v. R. D. Baker Co.—three decisions of great significance to attorneys of corporations qualified in one or more states.

Delaware Corporations. Presents in convenient form a digest of the Delaware corporation law, its advantages for business corporations, the attractive provisions for non par value stock, and a brief summary of the statutory requirements, procedure and costs of incorporation—completely up-to-date as regards the most recent amendments.

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